impact on the level of social services are severe by any recent budgetary standards.

On the tax side, the President proposes extending the present $18 billion tax cut, plus another $10 billion cut in personal and corporate taxes effective July 1, 1976—all conditional on appropriate cuts in projected spending. His proposed increases in payroll taxes, effective next Jan. 1, will offset nearly $8 billion (at annual rates) of the additional $10 billion.

The combined tax and spending changes in the Ford budget would add up to a withering fiscal drag on economic expansion during fiscal 1977. The high-employment surplus would rise by $19 billion for the fiscal year, with the restrictive pressure growing sharply and steadily during calendar 1977.

That the Congress will fully accept either the restrictive economic policy or the Spartan social policy implicit in Mr. Ford's budget is highly unlikely. True, no spending spree is in prospect. But a reasonable working assumption is that the pulling and hauling on the budget will bring spending up to about $410 billion for fiscal 1977. And after another noisy struggle, a further extension of the present $18 billion cut seems to be a good bet.

This policy projection implies little fiscal constriction until after the election. But even if spending winds up at $410 billion, fiscal policy will tighten in fiscal 1977. The tightening would be very modest if the proposed income and payroll tax changes are not enacted. But if the payroll tax cuts are accepted while the added income tax cuts are rejected, the net result would be an $11 billion restrictive impact on a 1977 economy still operating far below reasonable target levels.

Monetary policy, after a year of puzzles and surprises, is even more difficult to sketch into the mosaic of the 1976 outlook. But a reasonable person, with fingers crossed, could assume that the Federal Reserve would not overreact to a strengthening recovery unless the inflation outlook suddenly darkens. In other words, a monetary policy that produces a mild rather than sharp rise in interest rates is a reasonable projection. This implies that short-term rates, after some further easing, will move up only moderately as the year progresses. Long-term rates are not likely to rise until later in the year, and then only after giving some further ground in the next few months, especially in the mortgage area.

Given only moderately accommodative fiscal and monetary policy for 1976, where do Perry and I find the expansionary strength to support a forecast of 7% real GNP growth? Primarily in a more upbeat view of consumption and business capital spending (and, in the accompanying year-over-year advance of $25 billion in inventory investment) than most forecasters are projecting.

The sparkling performance of corporate profits will be the chief spur and lubricant for the revival of business fixed investment. Productivity advances and rising sales should generate a one-third rise in after-tax profits in 1976 on top of a striking jump during 1975. From 1975's first quarter to 1976's fourth, they should rise from $60 billion to over $100 billion at annual rates.

In a little longer—and "quality-corrected"—perspective, the profits boom is even more impressive. After inventory valuation adjustment (IVA)—that is, allowing for inventory replacement at current prices—profits in 1976 will be half again as high as in 1974. This will go a long way toward restoring corporate profitability, which had hit a postwar low of 8.1% of corporate product in 1974.

Led by the profit surge, internal cash flow this year will reach historically high levels relative to business fixed investment. Add to this the incentive of a more generous investment credit and the ability to draw on reinvigorated capital markets, and upward revisions of capital spending plans should be the order of the day. They are not yet reflected in plant and equipment surveys and capital appropriations. But the sensitive index of capital goods orders has been rising impressively since April. An "optimistic-realistic" expectation for this year, is an 11% rise in business fixed investment. Barring unexpected setbacks in the consumer sector, this advance should accelerate during 1976 and into 1977 and become a primary driving force for expansion.

FOUR PLUSES

The rise in consumer spending that started after the first quarter of 1975, stimulated first by tax reductions and then by rising payrolls, will continue during 1976 in response to (1) a continued rise in real disposable income as employment rises and wage gains outpace the inflation in living costs, (2) an improved consumer buying mood as buying power grows and the threat of layoffs recedes, (3) stock market advances and the rising backlog of demand for durable goods and (4) strengthened consumer liquidity growing out of a $100 billion-plus rise in consumers' liquid assets for 1975, together with only modest increases in installment debt. A rise of 11.5% in overall consumption—with autos and other durables as the star performers—is in the cards.

Housing at 1.5 million starts, a moderately declining net export balance, and a lackluster government sector—especially at the state-local level—round out the 1976 prospects. It all adds up to a 1976 GNP advance of $196 billion, to a total of $1,695 billion (using the new Commerce Department GNP benchmarks). For the first time in four years and only the second time since 1968, more than half of the advance will represent a real gain, less than half, inflation.

Inflation will continue to moderate in 1976. With a good 1975 harvest in hand and average crude oil prices scheduled to come down moderately, neither food nor fuel should add materially to the rate of inflation this year. And although rising demand will generate some added pressures on raw materials prices and on price margins, the moderate pace of recovery in the industrial world in 1976, coupled with pervasive slack in the U.S. economy, should hold these pressures in check this year. Thus the crux of the matter is the behavior of wage costs.

With 4½ million workers involved in major wage negotiations this year, the outcome will be crucial in determining price performance in 1976 and the later '70s. As a result of cost-of-living escalators, several of the unions involved in the forthcoming negotiations have enjoyed wage advances considerably above the economy-wide average. If the government could influence these negotiations to set a pattern of moderation, the national goal of slowing the rate of inflation would be well served. These settlements would be a logical place to begin a gradual unwinding of the wage-wage and price-wage spirals. A reasonable expectation—even assuming that the big contracts, front-loaded as usual, will average 10% in the first year—is that economy-wide compensation per manhour will rise about 8% this year.

Given the abatement of food and fuel inflation, the modest impact of demand pressures, and an 8% average pay increase, the rise in the GNP price deflator this year should ease to about 5¾%, or three points less than last year.

An inflation rate of less than 6%, coupled with a 7% advance in real output, is cause for considerable satisfaction but no complacency. Despite the above-trend gain in output, the end of the year will still see recession-like levels of unemployment at 7¾%; of capacity utilization rates in manufacturing, at about 80%; and of economic slack, with actual output still running nearly $125 billion below the economy's potential (as measured at 5% unemployment).

DEFINING FISCAL RESPONSIBILITY

Congress rightly prides itself on its more prudent fiscal posture and procedures. But if the new politics of fiscal responsibility, or austerity, simply leads to budget parsimony and willy-nilly economic restraint, its benefits will be swamped by its costs. Congress should vividly bear in mind that massive swings toward fiscal restraint in 1959–60 and 1973–74 exacted a huge toll in lost jobs and output.

To hit the fiscal brakes, as Mr. Ford proposes, when unemployment and economic slack are still legion and inflation is ebbing would be fiscally irresponsible. "Fiscal responsibility" is not synonymous with "fiscal restraint." Rather, it calls for an intelligent fitting of tax and spending positions to the needs of the economy. With its new budget procedures and staff, the Congress is now equipped to do this. Given the will, it can become a major force in effecting a new fiscal policy of responsible net stimulus in a lagging or sagging economy, and responsible net restraint in a prosperous but inflation-prone economy.

(Mr. MILLER of Ohio asked and was given permission to extend his remarks at this point in the RECORD and to include extraneous matter.)

[Mr. MILLER of Ohio's remarks will appear hereafter in the Extensions of Remarks.]

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COMPARISON OF H.R. 10850 AND S. 1

(Mr. KASTENMEIER asked and was given permission to extend his remarks at this point in the RECORD and to include extraneous matter.)

Mr. KASTENMEIER. Mr. Speaker, the controversy surrounding S. 1, the bill pending in the Senate to revise and reform the Federal Criminal Code, has, by now, become apparent to us all. Innumerable questions have been raised about the effect of this legislation on individual rights, on the availability of Government information, and on the extent of Government control over individual Americans.

On November 20, 1975, along with my colleagues DON EDWARDS and AB MIKVA, I introduced H.R. 10850, the Criminal Law Revision and Constitutional Rights Preservation Act of 1975. We have offered this measure to provide an alternative to S. 1. Our bill proposes a revised Criminal Code which protects the rights of the individual in our society at the same time it more readily guarantees equality of treatment for all who come under our criminal justice system.

Since our introduction of this measure, there has been considerable interest expressed by many in and outside of the Congress in how H.R. 10850 differs from S. 1. A detailed comparison of the two

States will never be guaranteed their freedom from abuse of the Bill of Rights.

Tom Wicker, on the New York Times Op-Ed page of Sunday, February 22, expounded upon this issue quite well in an article entitled "Protecting the Culprits, Punishing the Accusers." In light of the points which Mr. Wicker raises, it is most distressing to realize that the only choice that President Ford could offer us is one between ignorance or fear. For the benefit of my colleagues, I am inserting the Wicker article in the RECORD:

[From the New York Times, Feb. 22, 1976]

PROTECTING THE CULPRITS, PUNISHING THE ACCUSERS

(By Tom Wicker)

One day after President Ford sent legislation to Congress proposing the criminal prosecution of Government employees who disclose certain kinds of classified information, the Department of Justice announced that it would not prosecute Richard Helms, the former Director of Central Intelligence, for his role in a 1971 burglary.

The Helms decision is being defended on two grounds—that there was "insufficient evidence" and that the break-in might have been within the C.I.A.'s authority. The contrast between this judgment and Mr. Ford's proposed legislation is nevertheless striking and symbolic of the instinct for self-preservation that seems to pervade the Government's actions, no matter what President or which party dominates it.

The net effect of Mr. Ford's proposals for "reforming" the C.I.A.—an effect dramatized by the Helms decision—is to give greater protection to those known to have abused their statutory powers, while proclaiming that those who disclosed those abuses will be prosecuted as felons if they do it again. The next time the C.I.A. exceeds its authority, anyone who "blows the whistle" in the public interest will be committing a criminal offense, while those who perpetrate the abuse will be protected by enforced secrecy and, in most cases, will be guilty only of violations of an executive order rather than of the criminal law.

They may not even be guilty of that limited transgression. For what this President orders today—that, for example, the C.I.A. should not open and read your mail—he or some other President can revoke tomorrow, and in secrecy at that, under pain of criminal prosecution of anyone who might make an unauthorized disclosure of this development in the collection and evaluation of information.

White House briefers contend that it will not be necessary in future for public-spirited intelligence officials who want to prevent abuses to make public disclosures. Instead, they argue, such officials could make authorized complaints to the new oversight board appointed by the President to act as a brake on the C.I.A. and other agencies.

But there's been a somewhat oversight board—the Foreign Intelligence Advisory Board—since the early 1960's, without noticeable effect on massive illegitimate domestic operations by the C.I.A. Look what would happen, moreover, if in the future some C.I.A. man took a complaint about illegal activities to the new oversight board:

The board, receiving such a complaint, is supposed to recommend to the Attorney General that he punish or prosecute those involved.

But the Attorney General could decide only to report the matter to the President.

In that event, sanctions—if any—would be decided upon within the executive branch.

The case of Richard Helms tells us a great deal about the likelihood that an Attorney General appointed by a President would prosecute rather than turn the matter over to the President—who would have an obvious interest in keeping as secret as possible abuses carried out by an agency for which he was responsible, perhaps by officials he had appointed, and—witness Richard Nixon—in which he himself might be deeply implicated. It is not even certain that the oversight board—itself appointed by the President—would act on complaints of abuses by others of his appointees.

At his news conference, Mr. Ford assured us that he would never tolerate abuses by intelligence agencies. Even if that is taken at face value, it cannot bind future Presidents—Mr. Ford said he "hoped" only trustworthy types would be elected, as if hopes were safeguards—nor even cover Ford Administration appointees who might misguidely insulate him from knowledge of what was happening in his own house.

If intelligence abuses are to be prevented, narrowly defined missions for and limitations on the agencies involved must be set forth in legislation, not revocable Presidential guidelines; oversight powers must be firmly vested in a Congressional body neither appointed by nor beholden to the executive branch, and capable of influencing policy decisions not just reviewing them; and the right of a public servant, if all else fails, to make public disclosure of secret abuses must be maintained. The Ford proposals fail all three tests so thoroughly that they can only have been designed to do so.

Mr. Ford has contrived, moreover, the strategic myth that the real problem is "the irresponsible and dangerous exposure of our nation's intelligence secrets." Its purpose is to divert opprobrium from the culprits to their accusers, and the culmination of the strategy is in these Kafkaesque "reforms" that would largely prevent further disclosure while doing little about what was actually exposed—not vital secrets but the blunders, abuses and crimes of the CIA.

THE PRESIDENT'S BUDGET IS THREAT TO THE ECONOMY

(Mr. OTTINGER asked and was given permission to extend his remarks at this point in the RECORD and to include extraneous matter.)

Mr. OTTINGER. Mr. Speaker, the dangers posed by the President's budget proposals to the Nation's economy are very succinctly and perceptively examined in a recent article by Prof. Walter W. Heller of the University of Minnesota.

The distinguished former Chairman of the Council of Economic Advisers under Presidents Kennedy and Johnson quite properly observes that—

To hit the fiscal brakes, as Mr. Ford proposes, when unemployment and economic slack are still legion and inflation is ebbing would be fiscally irresponsible.

He reminds us that attempts at fiscal restraint during the periods 1959–60 and 1973–74—exacted a huge toll in lost jobs and output.

Professor Heller's well-written and very timely article in the Wall Street of February 5, 1976, deserves close consideration and attention by us all and I insert it herewith for inclusion in the RECORD:

FORD'S BUDGET AND THE ECONOMY

(By Walter W. Heller)

Policy developments of the past few months have cleared the track for a respectable rate of recovery this year. Interest rates have backed down, the 1975 tax rates have been extended, gradual rather than abrupt decontrol of oil prices is in prospect and New York City has been pulled back from the brink of bankruptcy.

Rising business and consumer liquidity, ebbing inflation, accelerating retail sales and a surging stock market all contribute to the atmosphere of expansion. All told, it is an encouraging backdrop for reaffirming the bullish forecast of a 7% advance in real GNP in 1976 that George Perry and I first ventured in October.

But President Ford's budget and economic policy messages cast an ominous shadow over late-1976 and 1977 economic prospects. His Economic Report resolves all economic doubts in favor of subdued expansion in 1976 lest we agitate the inflationary beast within us. And his budget sets the fiscal dials to "hard astern" for 1977. If Congress and the Federal Reserve respond with fiscal and monetary restriction this year, recovery could be imperiled next year long before the country reaches anything resembling full prosperity.

So the outcome of the Bicentennial battle of the budget will have profound implications not only for social policy but for economic performance. Where are the battle lines drawn for fiscal 1977? Given increasing budgetary caution and discipline in Congress and a conservative but not Neanderthal President in the White House, one can safely say that the range of outcomes is not bounded by wild election-year spending on one hand and a $90 billion cut on the other. Much more likely—giving proper weight to the President's budget cutting initiatives (and veto powers) and the shift toward sobriety-in-spending in Congress, both reinforced by the public's anti-spending mood—is a battle arena bounded at the upper end by a maintenance-of-services or hold-the-line budget of $414 billion and at the lower end by the President's $20-billion-cutback budget of $394 billion.

When the President first proposed his 28–28 program last October, he was operating from a "current services budget" benchmark of $423 billion. But after downward revisions in the light of more accurate information and "congressional increases threatened but not passed," the figure was scaled down to $414 billion. That is the level of spending that would be required in fiscal 1977 (starting Oct. 1, 1976) to maintain services and commitments at fiscal 1976 levels. Mr. Ford would whittle $20 billion off this revised "current-services budget" by holding social programs $10.5 billion below prevailing levels; civilian and military pay, $3.5 billion below; other defense, $1.5 billion; and "all other" $4.5 billion.

A COMPARISON

Another way of looking at the 1977 Ford economy-model budget is to compare it with "normal" budgetary growth. The $21 billion increase over the fiscal 1976 budget is just half the average increase of the three preceding years. (After factoring in the three months' hiatus—with its own "transition quarter" budget—before fiscal 1977 begins, the applicable rate of increase comes to only $17 billion.)

Some $13 billion of the $21 billion increase represents the actual growth in defense and interest costs. This seems to leave only $6 billion for all other programs. But, as recovery continues, an added $5 billion becomes available through the automatic shrinkage of unemployment compensation and other "cyclical" transfer payments. Thus $11 billion is available to finance increases in all other "non-cyclical" civilian programs. Normal growth in these programs, consisting of a 6% allowance for inflation and 4% real expansion, would come to $31 billion. By this measure, too, the Ford budget represents a $20 billion scaling back of government programs. So both the overall cutback and its

bills has finally been completed. I would like to insert that comparison at this time, notwithstanding the fact that it exceeds two pages of the RECORD and is estimated by the Public Printer to cost $1,644.50.

The citations noted are to S. 1 as it has been marked up and published as a committee print dated August 15, 1975.

The material follows:

COMPARISON OF H.R. 10850 AND S. 1

GENERAL DEFINITIONS

(§ 111 in both bills)*

Abet: H.R. 10850 eliminates "encourage" and "counsel" from the definition of "abet."

Consent: H.R. 10850 provides that assent induced by economic coercion does not constitute "consent." The result of this change can be illustrated by an employer who unreasonably compels employees to work under dangerous conditions by means of threatening economic retaliation. Under H.R. 10850, such an employer could not raise the affirmative defense of consent to an assault charge.

Property: H.R. 10850 specifies that property does not include information of any sort in the possession of the United States. This prohibits prosecuting someone under the various theft offenses when the gist of the act is disclosure of government *information*. If it is believed that there should be criminal penalties for disclosing classified information, this change ensures that the only applicable sections will be those specifically designed to deal with such conduct.

War: S. 1 does not define the term "war," although the Draft Report on S. 1 indicates at one point that the term "war" in S. 1 includes both declared and undeclared war (see p. 242 no. 50). H.R. 10850 defines "war" as "a state of war declared by Congress pursuant to Article I, section of the Constitution."

GENERAL PRINCIPLES OF CONSTRUCTION

(§ 112 in both bills)

S. 1 proposes the general rule that criminal statutes are to be strictly construed—that is, that only conduct clearly prohibited by the express terms of the statute will be deemed to be included in the offense defined by the statute.

H.R. 10850 takes the somewhat more limited approach recommended by the National Commission on Reform of Federal Criminal Laws (the "Brown Commission") that the provisions of a criminal code should be interpreted in accord with the general purposes of the criminal law as set forth in § 101. H.R. 10850 directs the court to balance the need for appropriate sanctions for conduct which is harmful to society with the need to provide fair notice that the conduct is prohibitd by the criminal law.

H.R. 10850 also strikes a provision in S. 1 that a term used in the present tense includes both the future and past tenses. It ils believed that such a provision may cause unintended consequences in various sections of the code.

COMPLICITY

(Chapter 4 in both bills)

H.R. 10850 and S. 1 differ significantly in their treatment of accomplice liability in two respects.

(1) H.R. 10850 distinguishes between those persons who knowingly aid or abet a crime with a "stake in the outcome" and those who provide assistance but who are indifferent with respect to the criminal objective. This distinguishes, for example, between (a) the look-out man for a bank robbery who is equally culpable with the others for the robbery itself (although he never enters the bank) and (b) the person who sold the robbers the car they used for the getaway knowing when he sold the car that it would be so used. It is believed that the criminal law should recognize the commonsense difference in blameworthiness of the two situations and provide lesser penalties for the latter. Present law is judge-made on this point and prevents a split of authority. The Brown Commission proposed to distinguish between accomplices and facilitators. The American Bar Association also supports the distinction.

(2) S. 1 proposes to retain the rule that a co-conspirator is liable for all crimes that are the reasonably foreseeable result of the conspiracy. This rule was announced by the Supreme Court in *Pinkerton* v. *United States*, 328 U.S. 640 (1946).

H.R. 10850 follows the recommendation of the Brown Commission and abolishes the *Pinkerton* rule. It provides instead that a co-conspirator is liable for the offenses of his associates only to the extent that he meets the normal requirements for accomplice liability. The American Bar Association supports the abolition of the *Pinkerton* rule, stating that by punishing "negligence liability" the rule "goes too far," and "does not easily admit of rational application."

APPLICATION AND SCOPE OF BARS AND DEFENSES

(§ 501 in both bills)

S. 1 provides that to the extent that the criminal code covers the general subject matter of a bar or defense, it precludes any common law development by the courts of additional bars or defenses.

H.R. 10850 provides that unless additional bars or defenses are expressly precluded by a particular section of the code, additional bars or defenses may be developed by the courts "in the light of reason and experience."

The significance of this change is discussed in connection with "Exercise of Public Authority" (§ 541 of S. 1).

TIME LIMITATIONS

(§ 511 in both bills)

S. 1 provides no time limitation for the commencement of a prosecution for a crime punishable by death, a 5 year limitation for a felony or a misdemeanor, and a 1 year limitation for an infraction.

H.R. 10850 provides a 5 year limitation for any felony, a 2 year limitation for a misdemeanor, and a 1 year limitation for an infraction. (H.R. 10850 contains no crimes punishable by death).

DOUBLE JEOPARDY

(§§ 514–20 in H.R. 10850)

These sections are essentially similar to those proposed by the Brown Commission and implement and codify the Constitutional prohibition against double jeopardy. S. 1 contains no similar provisions.

There are two situations. First, Federal prosecution for conduct previously prosecuted by a State. The Supreme Court has said that this does not constitute double jeopardy. *Abbate* v. *United States*, 359 U.S. 187 (1959). Section 517 of H.R. 10850 reverses this decision and bars subsequent prosecution.

The second situation is State prosecution for conduct previously prosecuted by the Federal government. Section 518 of H.R. 10850 also bars subsequent prosecution in this circumstance.

INSANITY DEFENSE

(§ 522 in both bills)

S. 1 abolishes the traditional insanity defense—insanity will only prevent conviction if mental disease or defect negates the state of mind required by the offense. The Draft Report on S. 1 (p. 110) cites the example of a "madman who believes that he is squeezing lemons when he is actually choking his wife."

According to the Draft Report, the madman would not be guilty of murder, but not because of the defense of insanity. Rather, he is not guilty because he did not knowingly cause the death of another person as required by the crime of murder.

H.R. 10850 retains the traditional insanity defense as codified by the American Law Institute's Model Penal Code § 4.01 (P.O.D. 1962). Insanity is a defense if, as a result of mental disease or defect, the defendant either lacked substantial capacity to appreciate the criminality of his conduct or was unable to conform his conduct to the requirements of the law. This formulation of the defense is now widely used throughout the Federal courts. *See United States* v. *Brawner*, 471 F.2d 969, 979–81 (D.C. Cir. 1972). The same formulation was recommended by the Brown Commission and has the support of the American Bar Association.

EXERCISE OF PUBLIC AUTHORITY

(§§ 541 in S. 1)

S. 1 provides that it is a defense to Federal prosecution that the conduct charged was required or authorized by law (1) to carry out the defendant's authority as a public servant or as a person acting at the direction of a public servant, or (2) to make an arrest as a private person.

This defense is available even though the defendant was mistaken in his belief, if he reasonably believed that the "factual situation was such that the conduct charged was required or authorized as set forth in the section describing the defense."

This section of S. 1, which has come to be called the "Ehrlichman defense," has been the subject of much criticism. While a law enforcement officer making an arrest, for example, should not be subject to criminal sanctions for conduct authorized by law, the formulation of the defense in S. 1 may lend itself to an interpretation that would insulate public officials from accountability for their actions if they reasonably believed that their conduct was lawful, even though they were mistaken.

Federal courts have not at present accepted this kind of defense. Rather than codifying this kind of defense, H.R. 10850 permits the courts to develop it on a case-by-case basis "in light of reason and experience" (see discussion of "Application and Scope of Bars and Defenses" above).

USE OF FORCE TO MAKE AN ARREST

(§ 543 in H.R. 10850 and § 541 in S. 1)

S. 1 deals with this subject in its public authority defense § 541). H.R. 10850, as noted above, has no general public authority defense; it has a specific provision dealing with use of force to effect an arrest.

Under both bills, it is a defense to Federal prosecution that the force used was required by law in order to make an arrest, prevent an escape from arrest, or prevent an escape from official detention.

The bills differ somewhat in their treatment of the use of deadly force. Where such force is used to make an arrest or prevent an escape from arrest, both bills reach the same result—there is a defense if the deadly force was reasonably required under the circumstances and if the suspect committed an offense involving the risk of serious bodily injury or death (including rape and kidnapping) or if the suspect attempted escape by the use of a dangerous weapon. The bills differ, however, when the deadly force was used to prevent the escape of someone in official detention. S. 1 permits the defense if the deadly force was reasonably required under the circumstances. However, the defense is unavailable if the person using the deadly force knew that the prisoner was

*All section, chapter and rule references are to sections, chapters and rules that each bill proposes to put in Title 18, United States Code. Thus, § 111 means § 111 of Ttitle 18, United States Code, as both bills propose it to read, not to § 111 of present Title 18 or to § 111 of either bill.

being held for a crime other than one involving a risk of death, serious bodily injury, rape or kidnapping. H.R. 10850 permits the defense if the deadly force was reasonably required and if the person who used it knew that the prisoner was charged with a crime involving a risk of death, serious bodily injury, rape or kidnapping.

The difference between the two bills can be illustrated by the example of an escaping prisoner who is killed by a guard who doesn't know what charge the prisoner is held on. Under S. 1, the guard has a defense if the deadly force was reasonably necessary. Under H.R. 10850, the guard does not have a defense.

UNLAWFUL ENTRAPMENT

(§ 513 in H.R. 10850 and § 551 in S. 1)

The Supreme Court, by divided votes, has adopted the view that the entrapment defense requires a determination of whether the defendant was inclined to commit the crime, apart from the solicitation of the government agent. If he was, there is no defense. *See, e.g., United States* v. *Russell,* 411 U.S. 423 (1973). S. 1 adopts this view.

H.R 10850 adopts the recommendation of the Brown Commission. Rather than focusing on the predisposition of the defendant to commit the crime, H.R. 10850 focuses on the conduct of the Federal agent. The focus of the inquiry is whether the agent used methods of persuasion or inducement that would lead normally law-abiding citizens to engage in criminal activity. The defense is treated primarily as a curb upon improper law enforcement techniques, rather than as a test of the "blameworthiness" of the particular defendant.

S. 1 treats entrapment solely as a defense. H.R. 10850, however, provides the defendant with the alternative of raising the issue before trial as a bar to prosecution. Such an issue is decided by the judge rather than the jury. H.R. 10850 provides that evidence given in such a pre-trial proceeding is inadmissible at trial, so this procedure allows the defendant to raise the issue of entrapment without sacrificing his right against self-incrimination.

Under both S. 1 and H.R. 10850, entrapment must be disproved by the prosecution beyond a reasonable doubt if there is evidence in the case which might support a reasonable belief as to its existence. In S. 1, Rule 25.1 of the Federal Rules of Criminal Procedure mandates this result for all defenses. H.R. 10850 reaches a similar result in Rule 25.1 of the Federal Rules of Criminal Procedure. However, it also includes specific language in § 513 because there is no corresponding section dealing with burdens of proof for bars to prosecution.

OFFICIAL MISSTATEMENT OF LAW

(§ 552 in H.R. 10850 and § 551 in S. 1)

S. 1 provides that it is an affirmative defense that the defendant acted in accord with an official, written interpretation of the law issued by the head of a government agency charged with responsibility for administration of such law.

H.R. 10850 eliminates this provision out of concern for its possible abuse and out of a belief that the courts must have the ultimate responsibility for determining the law.

CRIMINAL ATTEMPT

(§ 1001 in both bills)

S. 1 provides that a person is guilty of an attempt if he engages in conduct which, in fact, amounts to *more than mere preparation* for, and that *indicates his intent to complete,* the commission of the crime.

H.R. 10850 adopts the formulation that the conduct must be *a substantial step* towards commission of the crime. The difference is one of emphasis but reflects a two-fold intent. One part is the desire to permit the courts to develop further the basic interpretation of the offense. The other part is to require an act falling closer to a completed offense than to mere preparation.

S. 1 provides that legal or factual impossibility is not a defense to criminal attempt. H.R. 10850 does not so provide, but leaves it to the courts to decide whether legal or factual impossibility should be a defense to criminal attempt. In certain circumstances, such a defense seems to be necessary and in the best interests of justice. For example, a defendant is charged with attempt to receive stolen property. The property is not actually stolen, even though the defendant believes it to be. In such a case, the court held that the impossibility defense required a finding of not guilty. *United States* v. *Hair,* 356 F. Supp. 339 (D.D.C. 1973).

CRIMINAL CONSPIRACY

(§ 1002 in both bills)

A conspiracy is not complete until one of the conspirators engages in an overt act. The purpose of the overt act requirement is to manifest that the conspiracy is at work and is "neither a project still resting solely in the minds of the conspirators nor a fully complete operation no longer in existence." *Yates* v. *United States,* 354 U.S. 298, 334 (1957). H.R. 10850 requires that the overt act "substantially tend to effect" the criminal objective. S. 1 merely requires that the act be done with intent to effect such objective.

Both bills provide that it is an affirmative defense to a charge of criminal conspiracy that the defendant withdrew from the conspiracy. H.R. 10850 requires that the defendant prove that he, in fact, did withdraw. S. 1 goes further and requires that the defendant prevent the commission of every crime that was an object of the conspiracy.

S. 1 provides that it is not a defense to a charge of criminal conspiracy that one or more of the persons with whom the defendant allegedly conspired has been acquitted. H.R. 10850 deletes this language and permits the courts to deal with particular situations on a case-by-case basis. A conspiracy requires that at least one other person participate in the agreement. If only two persons are charged with conspiracy and one is acquitted, how can the other be convicted?

CRIMINAL SOLICITATION

(§ 1003 in S. 1)

S. 1 provides that a person is guilty of an offense if, intending that another person commit a crime, he "commands, entreats, induces or otherwise endeavors to persuade such other person to engage in such conduct."

H.R. 10850 does not provide a solicitation offense of general applicability. When a crime has been committed, the solicitor of it will be liable as an accomplice or facilitator. See §§ 401–02 in H.R. 10850. When no crime does, in fact, occur, it would seem that insufficient harm has occurred to society's interests to justify creating a general crime punishing pure speech. Further, certain crimes within the code are defined in terms of incitement to engage in criminal conduct, and the general attempt provision may also be used (where not expressly made inapplicable) to reach what would otherwise be solicitation.

INSTIGATING OVERTHROW OR DESTRUCTION OF THE GOVERNMENT

(§ 1103 in S. 1)

This offense in S. 1 incorporates the Smith Act offenses: (1) inciting overthrow of the government; (2) organizing, leading or recruiting members for an organization whose purpose is inciting overthrow of the government; and (3) active membership in a group with that purpose.

H.R. 10850 eliminates these offenses. This section of S. 1 may be used to suppress constitutionally protected speech. Its mere existence may tend to chill first amendment freedoms. Under H.R. 10850, persons who actually engage in conduct directed toward the forcible overthrow of the government are subject to prosecution under § 1102 (Armed Rebellion or Insurrection) and § 1103 (Engaging in Para-Military Activity). Further, certain preparatory acts can be prosecuted under the general attempt and conspiracy sections in H.R. 10850.

SABOTAGE

(§ 1111 in both bills)

Both bills require that the destructive act be done with an intent to impair, interfere with, or obstruct the ability of the United States or an associate nation to prepare for or engage in war or defense activities.

H.R. 10850 confines the applicability of this offense to those instances of greatest harm to the national defense. It defines more narrowly than S. 1 the property or production facilities whose damage is covered by the sabotage offense. It should be noted that H.R. 10850 makes damage to the other property criminal but subjects it to lesser penalties under other provisions of the criminal code.

IMPAIRING MILITARY EFFECTIVENESS

(§ 1112 in S. 1)

This offense is a companion to the sabotage offense and differs from it in the *scienter* requirement. A person is guilty of this offense if he acts "in *reckless disregard* of the risk that his conduct could impair, interfere with or obstruct the ability of the United States or an associate nation to prepare for or engage in war of defense activities" (emphasis added). (The sabotage offense requires that he act intentionally.

H.R. 10850 does not contain this offense. An offense based on recklessness poses substantial dangers of abuse against persons engaged in demonstrations and other constitutionally protected activities. Given the broad definition of defense property and facilities in the sabotage offense of S. 1, almost any demonstration entails some risk that damage to such property could occur.

IMPAIRING MILITARY EFFECTIVENESS BY A FALSE STATEMENT

(§ 1114 in S. 1)

Under this section of S. 1, a person is guilty of an offense if, with intent to aid an enemy or to harm the United States in time of war, he communicates (including publishes), in reckless disregard of its falsity, a statement of fact concerning conduct of the military forces of the United States, a civilian or military catastrophe, or "any other matter of fact which, if believed, would be likely to affect the strategy or tactics of the military forces of the United States or would be likely to create general panic or serious disruption."

H.R. 10850 eliminates this offense out of a concern that it would have a chilling effect on the ability of the news media to keep the public informed during times of national crisis.

OBSTRUCTING MILITARY RECRUITMENT OR INDUCTION

(§ 1114 in H.R. 10850 and § 1116 in S. 1)

In order to protect mere speech, H.R. 10850 requires that incitement to evade military or alternate civilian service must be incitement to *immediate* unlawful action. This is in compliance with the Supreme Court decision in *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969).

INCITING OR AIDING MUTINY, INSUBORDINATION OR DESERTION

(§ 1115 in H.R. 10850 and § 1117 in S. 1)

For the reasons above, H.R. 10850 requires incitement to *immediate* unlawful action, in this case, mutiny, insubordination, refusal of duty or desertion.

H.R. 10850 rquires a specific intent to bring about mutiny or desertion in order to be guilty of aiding or abetting such offenses. S. 1 requires only "knowing" aid.

H.R. 10850 also adds a new provision rendering the general accomplice, attempt and conspiracy offenses inapplicable to this section. This will prevent prosecution of conduct too far removed from actual harm to society's interests. Thus, for example, an attempt to incite desertion is relatively meaningless because the completed crime of incitement does not require that desertion actually occur.

AIDING ESCAPE OF A PRISONER OF WAR OR AN ENEMY ALIEN

(§ 1116 in H.R. 10850 and § 1118 in S. 1)

For the reasons above, H.R. 10850 requires that the defendant have a specific intent to bring about the escape of a prisoner of war or enemy alien in order to be guilty of aiding or abetting such offense.

Also for the reasons above, H.R. 10850 makes the general accomplice, attempt and conspiracy offenses inapplicable to this section.

Espionage and Related Offenses

S. 1 contains the following offenses:

§ *1121:* Knowing that "national defense information" could be used to the prejudice of the safety or interest of the United States or to the advantage of a foreign power, the defendant communicates (including publishes) such information to a foreign power; obtains or collects such information "knowing that it may be communicated to a foreign power;" or enters a restricted area for the same purpose. The offense is a Class A felony (death penalty) during war or national emergency or for particular information, and a Class B felony (30 years) in any other case.

§ *1122:* Knowing that "national defense information" could be used to the prejudice of the safety or interest of the United States or to the advantage of a foreign power, the defendant communicates (including publishes) such information to a person he knows is not authorized to receive it. It is a Class B felony (30 years) if the information is "restricted data" (pertaining to atomic energy), a Class C felony (15 years) during war or national emergency, and a Class D felony (7 years) in any other case.

§ *1123:* Someone in *authorized possession or control* of national defense information (*e.g.*, a government employee) who recklessly causes its loss, destruction, theft or communication to a person not authorized to receive it; fails to report such loss, etc.; or intentionally fails to deliver it on demand to a Federal public servant who is authorized to demand it, is guilty of an offense under subsection (1).

Someone with *unauthorized possession or control* of national defense information (*e.g.*, a reporter) who recklessly causes its loss, destruction, theft or communication (including publication) to another person not authorized to receive it, or who fails to deliver it promptly to a Federal public servant entitled to receive it, is guilty of an offense under subsection (2). The person need only be "reckless" with regard to the fact that the information is national defense information.

The offenses in subsections (1) and (2) are Class D felonies (7 years).

§ *1124:* If a person in authorized possession or control of *classified information* (*e.g.*, a government employee) or who has obtained such information as a result of being or having been a Federal public servant, communicates such information to a person not authorized to receive it (*e.g.*, a reporter), that person is guilty of a Class E felony (3 years). The person is guilty of a class D felony (7 years) if the recipient is the agent of a foreign power.

The section provides that the recipient of the information (*e.g.*, a reporter) cannot be prosecuted as an accomplice or co-conspirator or for solicitation of this offense.

The section also provides a bar to prosecution if the information was not lawfully subject to classification. The provisions of Executive Order 11652, 37 Fed. Reg. 5209 (1972), would govern whether the information was properly classified. The court would review the materials *"in camera"* (in a closed session). The Draft Report on S. 1 also indicates (pp. 252–53) that, to the extent possible, the hearing should be *"ex parte"*, that is, without the participation of the defense.

This section further requires that there be in existence a procedure whereby a government employee can obtain administrative review of the propriety of classification.

In addition, in order to initiate a prosecution under § 1124, the head of the government agency that classified the material and the Attorney General (or his delegate) must certify that the classification was proper.

The section is made inapplicable to a communication to Congress made pursuant to a lawful demand (*e.g.*, a subpena).

It should be noted that this section makes the conduct criminal even if the information has already been made public by another person. Only if the information has been formally declassified will this section not make the conduct criminal.

§ *1125:* A person is guilty of a Class D felony (7 years) if, being an agent of a foreign power, he obtains or collects classified information that he is not authorized to receive. "Foreign power" includes international organizations, such as the United Nations, the International Cotton Institute, the World Health Organization and others designated by executive order. *See* Section 1 of the International Organizations Immunities Act, 22 U.S.C. § 288.

§§ *1126–27* pertain to registration of foreign agents. These provisions are identical to comparable provisions of H.R. 10850.

§ *1128* provides definitions for the terms used in the above offenses.

"National defense information" includes information not previously made public pursuant to authority of Congress or by the *lawful* act of a public servant. The information must relate to:

(1) the military capability, planning, operations, communications, installations, weaponry, weapons development or research of the United States;

(2) the intelligence operations activities, plans, estimates, analyses, sources or methods of the United States;

(3) intelligence concerning a foreign power (see discussion of § 1125 above for definition of foreign power);

(4) communications intelligence information or cryptographic information; or

(5) restricted data (pertaining to atomic energy).

H.R. 10850 contains the following offense:

§ *1121.* A person is guilty of an offense if, with intent that classified national defense information be used by a foreign nation to injure the national defense of the United States, he knowingly communicates such information directly (thereby excluding publication) to a foreign power or agent; obtains such information in order to communicate it directly to a foreign power or agent; or enters a restricted area for the same purpose. The offense is a Class A felony (15 years) in time of declared war, and a Class B felony (7 years) at any other time.

H.R. 10850 does not contain sections comparable to §§ 1122–25 of S. 1.

"National defense information" means:

(1) technical details of tactical military operations in time of war;

(2) technical details of weaponry;

(3) defensive military contingency plans in respect of foreign nations; *provided* that such information would be used by a foreign power to injure significantly the national defense of the United States and that the information has not previously been made public in any form.

"Classified" means properly classified, and misclassification constitutes a defense.

OBSTRUCTING A GOVERNMENT FUNCTION BY FRAUD

(§ 1301 in S. 1)

A person is guilty of a Class D felony (7 years) if he "intentionally obstructs or impairs a government function by defrauding the government in any manner."

H.R. 10850 eliminates this offense. Since "government function" and "defrauding" are nowhere defined in S. 1, this section of S. 1 fails to give adequate notice as to prohibited conduct. Accordingly, it grants wide prosecutorial discretion to harass the press or government employees for "impairing" efficient operations by revealing embarrassing facts about official decision-making.

OBSTRUCTING A GOVERNMENT FUNCTION BY PHYSICAL INTERFERENCE

(§ 1302 in S. 1)

A person is guilty of a Class A misdemeanor if he intentionally obstructs or impairs a government function by means of physical interference or obstacle.

H.R. 10850 eliminates this offense for many of the same reasons as above. By use of broad and ill-defined terms, this section invites abuse of the rights to associate and petition the government. Almost any demonstration necessarily entails some disruption. Under the culpability provisions of § 302–03 of S. 1, the defendant must have intended to cause an obstruction, but he need only be reckless with regard to the fact that a government function was thereby disrupted. Such an offense does not give adequate breathing room to First Amendment rights.

HINDERING LAW ENFORCEMENT § 1311

(§ 1311 in both bills)

This section contains the offense commonly referred to as "obstruction of justice." The two bills differ in only one respect. S. 1 precludes the defense that the record or document destroyed, altered, concealed, etc., was legally privileged or otherwise inadmissible in evidence. H.R. 10850 does not expressly preclude this defense. The S. 1. provision overrules *Neal* v. *United States*, 102 F. 2d 643 (8th Cir. 1939), cert. denied, 312 U.S. 679 (1941) and may lead to inequitable results under certain circumstances. The matter is better left to continued development by the courts, as H.R. 10850 proposes.

Identical language concerning defense of privilege or inadmissibility has been eliminated from section 1325 (Tampering with Physical Evidence).

Since §§ 1315, 1322, and 1323 require acts of flight, and attempts to corrupt and to intimidate by force, language precluding the defense of inadmissibility is appropriate and is found in H.R. 10850.

CRIMINAL CONCEPT

(§ 1331 in both bills)

S. 1 makes criminal contempt a Class B misdemeanor (6 months). H.R. 10850 makes it a Class C misdemeanor (30 days).

MAKING A FALSE STATEMENT

(§ 1343 in both bills)

S. 1 makes criminal false, unsworn *oral* statements made to a law enforcement officer during the course of an investigation. The opposite result is recommended by the Brown Commission and the American Bar Association. H.R. 10850 adopts the Brown Commission-A.B.A. position.

PROOF OF PERJURY OR FALSE SWEARING

(§ 1347 in H.R. 10850 and § 1345 in S. 1)

Existing Federal law contains the so-called "two-witness rule" as a prerequisite to con-

viction for perjury. Section 1345(b)(1) of S. 1 overturns this rule.

H.R. 10850 takes the somewhat more limited approach recommended by the Brown Commission. It provides in § 1347(b)(1) that no person can be convicted solely upon the contradiction of one person. It does not necessarily require two contradictory witnesses, however. One such witness whose testimony is corroborated by additional evidence, including circumstantial evidence, is sufficient.

H.R. 10850 eliminates the provision, found in S. 1, that proof of two inconsistent statements is *prima facie* evidence of perjury or false swearing.

EAVESDROPPING

(§ 1521 in both bills)

S. 1 requires that only one party to a conversation must consent to the interception of a private oral communication. H.R. 10850 requires consent by all parties to the conversation, thus making it an offense for one person surreptitiously to record his conversation with another person.

EXTORTION

(§ 1722 in both bills)

By omitting the word "wrongfully" from the definition of this offense, S. 1 overturns the decision of the Supreme Court in *United States* v. *Enmons*, 410 U.S. 396 (1973). *See* Draft Report on S. 1 at 644–45. In that decision, the Supreme Court held that the Hobbs Act extortion provision could not be applied to labor activities, even if such activities involved "extortionate" conduct, as long as the objective of that conduct was to secure a benefit that legitimately could have been obtained through collective bargaining. The Court's decision was based upon its reading of congressional intent underlying the Hobbs Act.

H.R. 10850 uses the critical word "wrongfully" and preserves the Court's decision. While in no way condoning violent or threatening conduct by labor unions, there seems to be little reason to extend Federal jurisdiction to such activity whenever the United States mail is involved or whenever "the offense in any way or degree affects, delays or obstructs interstate or foreign commerce or the movement of an article or commodity in interstate or foreign commerce." Further, S. 1 makes the offense a Class C felony carrying a maximum of 15 years imprisonment, which seems wholly inappropriate for what may in many instances amount to minor acts of property destruction incident to strike activities.

TRAFFICKING IN AN OPIATE

(§ 1811 in both bills)

S. 1 requires a mandatory minimum sentence of 10 years for this offense under certain circumstances and a mandatory minimum sentence of 5 years in all other circumstances. The maximum authorized sentence is 30 years.

H.R. 10850 provides a maximum sentence of 15 years and does not restrict the discretion of the sentencing court by imposing a mandatory minimum sentence.

TRAFFICKING IN DRUGS

(§§ 1812–13 in H.R. 10850 and § 1812 of S. 1)

H.R. 10850 makes trafficking in marihuana a separate offense and reduces the maximum authorized sentence to no more than one year for the most serious offense specified, selling marihuana to a person less than 18 years old. Sale of marihuana to an adult is not prohibited under H.R. 10850.

POSSESSION OF MARIHUANA

(§§ 1814 in H.R. 10850 and § 1813 in S. 1)

S. 1 punishes simple possession of marihuana as a Class C misdemeanor (30 days, $10,000).

H.R. 10850 makes simple possession an infraction, which carries no prison sentence and a maximum fine of $100.

USING A WEAPON IN THE COURSE OF A CRIME

(§ 1823 in both bills)

H.R. 10850 changes the grading of the offense by eliminating the mandatory minimum term of 5 years and by eliminating the requirement that the term imposed under this section run consecutively with any other term imposed for the underlying offense.

LEADING A RIOT

(§ 1831 in both bills)

H.R. 10850 incorporates the holding of *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969), by requiring that a defendant charged with inciting a riot must be found to have caused a riot by incitement to *immediate* unlawful action.

H.R. 10850 also eliminates provisions found in S. 1 that provide Federal jurisdiction if "movement of a person across a state or a United States boundary occurs in the execution or consummation of the offense" or "the riot obstructs a federal government function." Thus, under H.R. 10850, Federal jurisdiction exists over riots only if the offense is committed within the special jurisdiction of the United States (see § 203 of H.R. 10850) or if the riot involves persons in a Federal prison. The jurisdiction under § 1833 (Engaging in a Riot) has been similarly limited under H.R. 10850.

DISSEMINATING OBSCENE MATERIAL

(§ 1842 in S. 1)

H.R. 10850 eliminates this offense. If there should be any crime of obscenity at all, it is best left to the individual States and is not properly a function of the Federal Government. The resources of Federal law enforcement officers should not be expended on such activity.

The American Bar Association supports the position that there should be no Federal offense of disseminating obscene material. It supports the provisions of S. 1 that make it criminal, in a Federal enclave, to disseminate material to a minor or in a manner affording no immediately effective opportunity to avoid exposure to it.

CONDUCTING A PROSTITUTION BUSINESS

(§ 1843 in S. 1)

H.R. 10850 eliminates this offense for many of the same reasons as above. The American Bar Association supports the deletion of this provision.

DISORDERLY CONDUCT

(§ 1861 in both bills)

H.R. 10850 eliminates provisions that make it a Federal offense to obstruct vehicular or pedestrian traffic or the use of a public facility; to persistently follow a person in a public place; or to "engage for no legitimate purpose in any other conduct that creates a hazardous or physically offensive condition."

FAILING TO OBEY A PUBLIC SAFETY ORDER

(§ 1862 in S. 1)

S. 1 provides that a person is guilty of an infraction (5 days, $1,000) if he disobeys an order of a public servant to move, disperse or refrain from specified activity in a particular place and if the order is, in fact, lawful and reasonably designed to protect persons or property.

H.R. 10850 eliminates this section and contains no comparable offense. A discretionary provision like § 1862 invites arbitrary and discriminatory enforcement. In addition, the section has been criticized for providing no guidance as to how to determine the lawfulness of the public servant's order. Further, it is questionable that there should be Federal jurisdiction whenever the order is that of a Federal public servant (regardless of the location of the offense) or whenever the offense does or would obstruct a Federal government function.

SENTENCING PROVISIONS

1. AUTHORIZED TERMS

	S. 1	H.R. 10850
Felony:		
Class A	Death [1]/life	15 yr.
Class B	30 yr.	7 yr.
Class C	15 yr.	4 yr.
Class D	7 yr.	2 yr.
Class E	3 yr.	
Misdemeanor:		
Class A	1 yr.	1 yr.
Class B	6 mo.	6 mo.
Class C	30 d.	30 d.
Infraction	5 d.	No authorized term of imprisonment.

[1] For some class A felony offenses. See discussion of death penalty below.

AUTHORIZED EXTENDED TERMS FOR DANGEROUS SPECIAL OFFENDERS

(§ 2301(b) in H.R. 10850 and § 2301(c) in S. 1)

S. 1 provides extended terms for a felony committed by "dangerous special offenders". The extended term may be up to twice the authorized term or 25 years, whichever is less.

H.R. 10850 also provides extended terms for "dangerous special offenders". For a Class A felony, the extended term is no more than 30 years; and for a Class B felony, not more than 15 years.

Who are "dangerous special offenders?" They fall into 3 categories—recidivists (repeat offenders), "professional" criminals, and participants in organized criminal acivity.

Recidivists: S. 1 requires conviction of 2 or more felonies committed on different occasions, at least one of which resulted in a term of imprisonment, and at least one of which occurred or resulted in imprisonment within 10 years of the current offense. H.R. 10850 shortens the time requirement to 5 years.

"Professional" criminals: S. 1 requires that the current felony constitutes a part of a pattern of criminal conduct and that the defendant *either* derived a substantial portion of his income from such criminal activities or has shown special skill or ability in such conduct. H.R. 10850 requires that the defendant must have gained a substantial portion of his income *and* shown special skill or ability.

Participants in organized criminal activity: Both bills require that the current felony be a part of a conspiracy with three or more persons to engage in a pattern of criminal conduct and that the defendant either exercise a leadership position or use bribery or force in the course of such conduct.

MULTIPLE SENTENCES OF IMPRISONMENT

(§ 2304 in both bills)

S. 1 provides that terms shall run concurrently unless the court affirmatively orders otherwise. If the terms are ordered to run consecutively, the maximum aggregate term may not exceed the maximum authorized term for an offense one class higher than that of the most serious offense of which the defendant was convicted. A consecutive sentence may *not* be imposed (1) if the offenses consist of Chapter 10 offenses (attempt, conspiracy or solicitation) and another offense which was the sole object of the attempt, conspiracy or solicitation; (2) if the offenses consist of an offense and a lesser offense included within it; or (3) if the offenses involve violation of a general prohibition and a specific prohibition encompassed within it.

H.R. 10850's provisions are similar to S. 1's. However, H.R. 10850 does not in every instance permit aggregation of all offenses to create a maximum term one class higher than the most serious offense for which the defendant was convicted. A person found

guilty of 2 or more Class C felonies may be sentenced to the maximum auhorized for a Class B felony if each offense was committed as part of a different course of conduct or if each involved a substantially different criminal objective. Class D felonies may be similarly aggregated to the maximum authorized for a C felony, and Class A misdemeanors may be aggregated to the maximum authorized for a D felony. No other offenses are subject to aggregation beyond the maximum authorized for the most serious offense involved. This approach was recommended by the Brown Commission.

4. Probation

S. 1 denies probation to persons convicted of a Class A felony. H.R. 10850 permits probation for all offenses.

H.R. 10850 provides a *presumption in favor of probation.* Unless the court finds that there is an undue risk that the defendant will commit another crime during probation or that a sentence to probation will unduly depreciate the seriousness of the defendant's crime or undermine respect for law, the court must order probation.

S. 1 is *neutral* with respect to whether probation should be granted. The court is directed to consider the same factors as it does in all sentencing decisions under S. 1: (1) the nature and circumstances of the offense; (2) the history of the defendant; (3) punishment; (4) deterrence; (5) incapacitation; and (6) rehabilitation.

TERMS OF PROBATION

	S. 1 (Sec. 2101(b))	H.R. 10850 Sec. 2102
Felonies	Not less than 1 nor more than 5 yr.	Class A: Not more than 4 yr; all other felonies, not more than 1 yr.
Misdemeanors	Not more than 2 yr.	Not more than 1 yr.
Infraction	Not more than 1 yr.	Not more than 30 d.

S. 1 allows the term of probation to be extended at any time if less than the maximum authorized term had originally been imposed. H.R. 10850 allows an extension only if a violation of a condition of probation has occurred, but allows the imposition of an additional term of probation, even if the maximum had originally been imposed.

Revocation of Probation. S. 1 does not contain a section giving procedures for revocation. H.R. 10850 provides full procedures, identical to those for revocation of parole (see below).

5. Parole

Parole Ineligibility. S. 1 authorizes the court to set a minimum term of imprisonment for *any* felony of up to one-fourth of the maximum authorized sentence or 10 years, whichever is less.

H.R. 10850 authorizes a minimum term, *for Class A or B felonies only,* of up to one-third of the prison term actually imposed.

Criteria. S. 1 permits parole if the parole commission is of the opinion that release at that time would not (1) prevent the administration of just punishment; (2) undermine the deterrent impact of the sentence; (3) subject the public to an undue risk of future criminal conduct; (4) deprive the prisoner of needed rehabilitative treatment; or (5) undermine institutional discipline.

H.R. 10850 provides that after the first year or any minimum term imposed by the court has been served, the prisoner *shall* be released on parole unless there is a high likelihood that he will engage in future criminal conduct, thereby endangering society and creating disrespect for the law.

TERMS OF PAROLE

	S. 1 (sec. 3834(b))	H.R. 10850 (sec. 3834(b))
Felonies:		
Class A	Not less than 1 nor more than 5 yr.	Not less than 1 nor more than 5 yr.
Class B	Same as class A	Not less than 1 nor more than 3 yr.
Class C	Not less than 1 nor more than 3 yr.	Not less than 1 nor more than 2 yr.
Class D	Not less than 1 nor more than 2 yr.	Not less than ½ nor more than 1 yr.
Class E	Not less than ½ nor more than 1 yr.	
Misdemeanors:		
Class A	Not less than 3 nor more than 6 mos.	Not less than 3 nor more than 6 mos.
Other misdemeanors and infractions.	No parole authorized.	No parole authorized.

6. Granting Parole

(§§ 3831–33 in both bills)

Interview: Both bills require the parole commission to grant an interview to the prisoner unless it is waived. H.R. 10850 requires a "knowing and intelligent" waiver.

Notice and Opportunity for Representation: H.R. 10850 requires at least 30 days prior notice of the interview; S. 1 specifies no time limit. H.R. 10850 allows the prisoner to be represented by an attorney and to have an attorney appointed if necessary; S. 1 does not provide for appointed counsel. H.R. 10850 explicitly requires adequate opportunity to consult with counsel prior to the hearing.

Access to Reports: H.R. 10850 requires access to materials to be used by the parole commission at least 30 days prior to the interview; S. 1 provides no time requirement. Both bills provide that a prisoner shall not have access to materials contained in the presentence investigation which would not be revealed under Rule 32 of the Federal Rules of Criminal Procedure. H.R. 10850 requires the commission to state on the record its reasons for non-disclosure. Both bills require a summary of withheld portions, and in addition, H.R. 10850 requires the commission to reveal any reasonably segregable portion of the exempt material.

Interview Procedure: H.R. 10850 requires that the prisoner be present during the questioning of witnesses, with the right to cross-examine them. The prisoner may also call witnesses and present evidence on his own behalf, subject to the commission's determination of relevancy.

S. 1 does not specify the hearing procedures.

Record: Both bills require that a full record of the interview be maintained and made available to the prisoner.

Notification of Determination: Both bills require that notification of the commission's decision be made within 15 working days. H.R. 10850 requires a detailed statement of reasons in support of the decision; S. 1 requires a less detailed explanation. If parole is denied, S. 1 requires a rehearing within 1 year (unless clearly inappropriate, in which instance it shall be held within 2 years). H.R. 10850 requires rehearing within 1 year.

7. Revoking parole

(§ 3835 in both bills)

Initiation of Proceedings: S. 1 provides that the parole commission may issue a warrant for the arrest of a parolee who is alleged to have violated a condition of his parole. The parolee is returned to prison pending the hearing.

H.R. 10850 provides that an arrest warrant may issue only if the parolee fails to appear for a hearing after being ordered to do so or if he is unlikely to comply with such an order. Only a parolee who is arrested is reimprisoned pending the hearing.

Preliminary Appearance: Both bills require a preliminary hearing to determine if there is probable cause to believe that the parolee has violated a condition of parole. H.R. 10850 requires this hearing to be held within 48 hours of arrest; S. 1 requires that the hearing shall be held without "unnecessary delay." Under H.R. 10850, no preliminary hearing is necessary if the parolee has been ordered to appear rather than arrested. Further, under H.R. 10850 an arrested parolee may only be kept in prison after the preliminary hearing if there is reason to believe that he will not appear for his final hearing if released or if he constitutes a danger to himself or others.

S. 1 does not specify the procedures to be followed at the preliminary appearance. H.R. 10850 requires full due-process rights, including right to counsel, appointed if necessary, cross-examination, presentation of witnesses and evidence, and a full record of the hearing.

Final Revocation-Hearing Procedure: S. 1 requires the hearing to be held within 60 days of the preliminary appearance; H.R. 10850 requires the hearing to be held within 30 days of the order to appear or date of arrest, whichever is later.

H.R. 10850 requires that the hearing may be waived only if done "knowingly and intelligently."

Both bills provide for appointed counsel if necessary. H.R. 10850 explicitly assures the right to consult with counsel and to examine evidence to be used at the hearing. S. 1 permits denial of cross-examination for "good cause." S. 1 permits any evidence to be received regardless of its admissibility under the Federal Rules of Evidence; H.R. 10850 requires that the evidence be lawfully obtained.

Disposition: H.R. 10850 requires that the commission notify the parolee of its decision within 14 days of the hearing; S. 1 provides no time limit. H.R. 10850 requires a detailed statement of reasons for the decision, whereas S. 1 requires a more abbreviated statement.

S. 1 provides a contingent term of imprisonment which the defendant may be ordered to serve if, prior to violation of a condition of parole, he had served his entire term. The contingent term is 90 days for a felony, 30 days for a Class A misdemeanor. H.R. 10850 contains no comparable provision.

8. Judicial Review of Parole Commission Determinations

In addition to an administrative appeal to a National Parole Commission, H.R. 10850 explicitly provides for a judicial review of violation of constitutional rights or of procedural rights granted by statute or regulation. In addition, H.R. 10850 provides that the reviewing court may set aside a parole commission determination if it is not supported by "substantial evidence" (the standard used for review of agency adjudications under the Administrative Procedure Act).

S. 1 does not authorize judicial review, although the Draft Report on S. 1 (p. 1082 n.48) recognizes that violations of constitutional rights will be subject to judicial review.

9. Revocation of probation

The Supreme Court has held that a revocation of probation must be conducted under the same procedures as a revocation of parole. *Gagnon* v. *Scarpelli,* 411 U.S. 778 (1973).

H.R. 10850 provides detailed procedures, essentially identical to those for revocation

of parole. S. 1 contains no comparable section.

10. Appellate review of sentencing decisions

(§ 3725 in both bills)

S. 1 permits the defendant to appeal from a sentence for a felony if the sentence exceeds 1/5 the maximum authorized fine or term of imprisonment. The government may appeal if the fine or term of imprisonment is less than three-fifths the authorized. An appellate court has the right to increase sentence if the government appeals. The standard of review is "clearly unreasonable."

H.R. 10850 permits only the defendant to appeal, and he may do so regardless of the fractional amount of the maximum authorized sentence which has been imposed. An appellate court may not increase the sentence. The standard of review is "excessive, having regard for the opportunity of the district court to observe the defendant."

Under S. 1, a death sentence is always subject to appellate review. H.R. 10850 does not provide for a death sentence.

H.R. 10850 requires that the sentencing court give a statement of its reasons for the sentence imposed at the time of sentencing. S. 1 does not require such a statement.

11. Death penalty

(§§ 2401–03 of S. 1)

S. 1 provides a mandatory death penalty for treason, sabotage, espionage and murder if the certain aggravating circumstances are found to exist and if certain mitigating circumstances are found not to exist.

H.R. 10850 does not authorize the death penalty.

INTERCEPTION OF COMMUNICATIONS

(§§ 3101–09 of S. 1)

S. 1 essentially reenacts the provisions of existing law relating to the use of wiretaps and other means of electronic surveillance for law enforcement purposes.

H.R. 10850 eliminates these sections, thereby making all wiretaps without prior consent of all parties to the communication unlawful. See § 1521 of H.R. 10850 (Eavesdropping).

IMMUNIZATION OF WITNESSES

(§§ 3111–15 in both bills)

S. 1 carries forward the "use" immunity provisions of existing law. As enacted in 1970 in the Organized Crime Control Act, 18 U.S.C. §§ 6001–6005, these provisions have been upheld against a Fifth Amendment challenge. *Kastigar* v. *United States*, 406 U.S. 441 (1972).

Adopting the position of the dissenters in *Kastigar* that "use" immunity does not fully protect Fifth Amendment rights, H.R. 10850 provides full "transactional" immunity. In addition, H.R. 10850 provides that notwithstanding a grant of immunity, no person may be compelled to testify to matters which would tend to incriminate the witness.

USE OF JUVENILE DELINQUENCY RECORDS

(§ 3605 in both bills)

H.R. 10850 provides that 5 years after attaining his majority, if the juvenile has not been convicted of any additional felonies during that period, all records regarding juvenile proceedings of an individual shall be destroyed.

S. 1 contains no provisions for destruction of juvenile records.

DETERMINATION OF MENTAL COMPETENCY TO STAND TRIAL

(§ 3611 in both bills)

Motion to Determine Competency. Both bills allow the prosecution, defense, or court on its own motion to initiate a hearing to determine the defendant's competency to stand trial. H.R. 10850 expressly provides for an opportunity by counsel to oppose such a hearing.

Examination and Report: H.R. 10850 allows the defense the right to choose one of the two psychiatrists appointed by the court to conduct the examination. Further, H.R. 10850 provides that the appointed psychiatrists may not be from the institution to which the defendant may be sent for treatment if found incompetent.

Both bills provide for a 60 day period of hospitalization to determine competency. H.R. 10850 specifies that the place of commitment *must* be a medical facility, whereas S. 1 permits the court to choose a "suitable" facility.

H.R. 10850 requires that the examining psychiatrists file a detailed, non-conclusory report as to their findings. In addition, it requires that defense counsel be permitted access to all medical records made in the course of the examination, together with a videotape of any staff conference held in the course of the examination. This requirement is a relatively practical and unobtrusive way to preserve the defendant's right of confrontation and cross-examination of witnesses. S. 1 contains no comparable provision.

H.R. 10850 requires that the report be filed within 7 days of the end of the examination period, whereas S. 1 provides no time limit.

Hearing Procedures: Both bills are identical in this respect.

Determination and Disposition: S. 1 incorporates the holding of the Supreme Court in *Jackson* v. *Indiana*, 406 U.S. 715 (1972) but chooses not to deal with the issues left unresolved by the Court. Thus, under S. 1 an accused found presently incompetent to stand trial may be committed for a "reasonable period of time" to determine if there is a substantial probability that he will, in the foreseeable future, attain the capacity to stand trial.

The commitment may continue for an additional "reasonable period of time" for treatment to render the accused competent to proceed. If at any time it is determined that there is no substantial probability that the defendant will regain sufficient competency in the foreseeable future, the defendant is subject to the provisions of § 3613 (Hospitalization of a Person Due for Release but Suffering from Mental Disease or Defect). Thus, S. 1 does not deal with the issue of disposing of pending charges, nor does it set any time limits on the process.

H.R. 10850 deals with both of these matters. For a person charged only with a misdemeanor, after the 60 day initial examination period has expired, he must be released if he has not attained the capacity to stand trial. All charges must be dismissed. Such a person would be subject to State civil commitment proceedings, but Federal jurisdiction ceases after the charges have been dismissed.

The procedure differs for those charged with one or more felonies. If, after the 60 day examination period, the court finds that there is a substantial probability that the defendant may be restored to competency in the foreseeable future, the court may commit the defendant for treatment for a period not to exceed 6 months. After the 6 month period, if the defendant remains incompetent to stand trial, then all charges must be dismissed and the defendant released. Release may be delayed pending transfer to State authorities for possible State civil commitment proceedings. Unlike S. 1, H.R. 10850 established no Federal civil commitment, and Federal jurisdiction ceases upon dismissal of all pending charges.

DETERMINATION OF THE EXISTENCE OF INSANITY AT THE TIME OF OFFENSE

(§ 3612 in both bills)

The changes made by H.R. 10850 in the preceeding section dealing with the psychiatric examination and report are applicable to this section as well.

In addition, while H.R. 10850 follows S. 1 in establishing for the first time in Federal law a special verdict of not guilty by reason of insanity, H.R. 10850 requires that the jury find beyond a reasonable doubt that the defendant has committed the acts charged in order to return such a verdict. If the jury makes no such finding, the appropriate verdict is not guilty.

FEDERAL CIVIL COMMITMENT

(§§ 3613–16 in S. 1)

S. 1 provides expanded Federal authority and responsibility for hospitalization and treatment of persons found not guilty by reason of insanity and of persons convicted of an offense who are due for release but suffering from mental disease or defect.

H.R. 10850 provides instead for a transfer procedure whereby such persons are referred to the appropriate officials in the State of their domicile for possible initiation of State civil commitment proceedings. There are essentially three reasons for this change: (1) doubts about the constitutional basis of Federal authority to commit persons not guilty of any Federal offense; (2) questions of equal protection if the standards for commitment differ in State and Federal proceedings; and (3) practical questions associated with securing appropriate treatment for persons in need of hospitalization, including an absence of necessary Federal facilities and a desire for community-based treatment, which must be done on a local level.

ADMISSIBILITY OF CONFESSIONS AND EYEWITNESS TESTIMONY

(§§ 3713–14 in S. 1)

S. 1 reenacts provisions found originally enacted in 1968 as part of the Omnibus Crime Control and Safe Streets Act (P.L. 90–351). The provisions are designed to overrule a variety of Supreme Court decisions dealing with the rights of criminal suspects under the Constitution.

Believing that these sections conflict with the Constitution, H.R. 10850 does not carry them forward.

ADMISSIBILITY OF EVIDENCE IN SENTENCING PROCEEDINGS

(§ 3715 in S. 1)

This provision of S. 1, which was originally enacted in 1970 as part of the Organized Crime Control Act (18 U.S.C. § 3577), permits the court to consider any evidence, including evidence illegally obtained, in its sentencing decision.

H.R. 10850 deletes this provision, thereby leaving to the courts the issue of whether the exclusionary rule extends to sentencing proceedings.

EFFECTIVE DATE OF THE LEGISLATION

S. 1 provides that the new criminal code shall take effect one year after enactment. Due to the substantial changes that this act makes in existing law and the need for the courts to have time to prepare for its implementation, including devising new jury instructions, H.R. 10850 extends the period to three years after enactment.

NEW SECTIONS ADDED BY H.R. 10850

Several generic sections have been added to complete the process of codification of all crimes that S. 1 begins. Thus, under H.R. 10850, there would be no offenses with a criminal sanction outside of Title 18, United States Code. It is estimated that under S. 1, approximately 800 non-Title 18 criminal offenses remain.

The sections added by H.R. 10850 to achieve this objective are §§ 1304 (Misusing Governmental Authority); 1345 (Information Disclosure Offense); 1765 (Prohibited Trade Practices); 1766 (Solicitation or Acceptance of an Unlawful Fee); 1862 (Failing to Obey a Public Safety Order); and 1864 (Regulatory Procedures Offense).

H.R. 10850 also creates several additional offenses not found in S. 1.

§ 1346 makes it an offense for a non-elected public servant to make a false, fictitious or fraudulent statement about a matter within

the jurisdiction of an agency or department of the United States, if the statement is made with the specific intent to deceive the public. The offense is a Class D felony (2 years).

§ *1704* relates to knowing acts of environmental spoliation in violation of a Federal statute, rule or regulation. It thereby incorporates many non-Title 18 offenses.

§ *1705* makes it an offense to knowingly cause, create a risk of, or fail to prevent or stop a "catastrophe". The term "catastrophe" is defined as serious bodily injury to 10 or more persons or substantial damage to 10 or more separate habitations or structures, or property loss in excess of $500,000. A comparable offense was proposed by the Brown Commission.

§ *1738* is a consumer fraud offense, also used to incorporate various non-Title 18 provisions prohibiting such activity.

CONGRESSMAN GEORGE E. BROWN, JR. DISCUSSES ENERGY AND NUCLEAR POWER

(Mr. HECHLER of West Virginia asked and was given permission to extend his remarks at this point in the RECORD and to include extraneous matter.)

Mr. HECHLER of West Virginia. Mr. Speaker, last Friday GEORGE BROWN, our colleague from California, delivered a major speech on nuclear power as a future energy source. Since this is a topic that is of interest to this body, and Mr. BROWN's remarks were about the dilemma facing the policymaker who is concerned about energy issues, I found this speech especially illuminating. Personally, I feel that Mr. BROWN has minimized the role which coal must play in meeting the Nation's short-term energy needs. I also feel that he has overstressed the difficulties with coal.

While I am certain that many Members, on both sides of the nuclear energy debate, will disagree with at least part of Mr. BROWN's remarks, I believe that all parties would agree that the nature of the dilemma is presented fairly in the following address:

ENERGY POLICY AND THE FUTURE OF NUCLEAR POWER: THE POLICYMAKER'S DILEMMA

(Remarks of the Hon. GEORGE E. BROWN, JR., American Association for the Advancement of Science, Boston, Mass., February 20, 1976)

I very much appreciate the opportunity to discuss the subject of energy and nuclear power with the audience and panelists here today, and the opportunity to present my own views about the dilemma an elected official faces with this issue.

It's perhaps appropriate that I have no particular expertise in this subject; I don't serve on the main Congressional watchdog committee, the Joint Committee on Atomic Energy, and I have previously expressed no strong views about the good or evil that nuclear power can bring. My main political concerns have been the issues of world peace, social and economic justice, and a vast array of issues best listed under the heading of "limits to growth." I've recently spent a great deal of my time attempting to deal with energy and environmental issues in a manner which I believe would promote the general welfare of all human beings both at home and abroad, and in this generation and generations to come. I have no illusions about the prospects of achieving substantial change during my lifetime. Nevertheless, I believe one must contribute their best efforts to the struggle, and hope for the achievement of some modest progress.

With this preamble to my remarks, I'll address the subject at hand, energy policy and nuclear power. I hope to describe the various choices that face a decision-maker, especially an elected official, and through this description place in context the issue of domestic nuclear power for the generation of electricity.

Let me say at the outset that I feel the entire development of nuclear energy has been historically cloaked in excessive secrecy. The involvement of informed non-nuclear energy specialists in the nuclear energy debate is an improvement, but is only very recent. A still more recent event has been the introduction of nuclear energy into electoral politics, and I am glad that this is finally happening. Today politicians may be labeled for their votes on such issues as research funds for the breeder reactor, export restrictions on light-water reactors, and the extension of the Price-Anderson Act, as well as their votes on taxes and foreign policy. In addition nearly half the States in the Union have initiative campaigns underway to put various types of nuclear issues on the election ballot. My own State of California has an initiative measure on this June's ballot which could, under certain circumstances, lead to the phase-out of fission energy for electric power production in the State of California. No matter what impression you receive from the rest of my remarks, I think the ballot initiative and the public debate are very healthy measures. I think it is long overdue that the public should be made more aware of the fundamental values which are involved in a selection of energy policy choices, and that both the public and policy makers should be forced to think hard about the alternatives and their consequences.

At this point, if I am before any audience in California, I am confronted by one or more emotional citizens who say "quit beating around the bush, tell us how you stand on the nuclear initiative." So my first dilemma is explaining why I have not yet taken a public stand on this important issue.

Perhaps these remarks will suffice as an answer to my own constituents in California, if I can persuade enough of them to read this statement.

I must say that it's difficult for me and many others to feel comfortable advocating any of the available energy supply alternatives. There are few who wouldn't admit to some misgivings about a "full speed ahead" nuclear policy, even though the supposed promise of an effortless transition to the post-fossil fuel era might seem tempting. On the other hand, one would have to be blind not to see grave problems in "stopping it dead now", even in the hope of an eventual change to a new age of benign energy source. There are also, of course, many difficulties in supporting most of the "compromise" positions, like mixing nuclear slow-downs with conservation or more rapid development of alternative technologies such as hydrogen fusion.

What I'd like to do is start from a basic, underlying idea about the origin of the energy predicament, and try to tell you where this seems to lead me. This will be as much in the hope of being corrected and educated by some of the many energy experts here as it will be in the intention of telling you anything you haven't heard before.

The underlying idea is simply that we have now been forced into choosing among a set of very nasty alternatives, because of having followed for a century or more policies of over-dependence on oil and natural gas, coupled with massive energy waste and the foolish abandonment of diversity in maintaining other sources of energy. Like any relatively unadaptable biological species, we will now have a hard time adjusting to the fundamental change in the conditions under which we live. In our case, this fundamental change is the approaching exhaustion of those energy sources on which we have become overly-dependent.

My feeling about the long-run need to maintain diversity and to correct this over-dependence on any one energy source colors the rest of what I will say.

"THE NATURE OF THE DILEMMA"

What are some of the elements of the energy dilemma confronting the policymaker in the Congress? First are the demand and supply curves. From a current total energy demand of about 70 quads we expect to reach about 150 quads by the year 2000. Domestic production of oil and natural gas has already peaked and probably will continue to decrease from current levels, even considering off-shore and Alaskan supplies. The increase in supply must come from increased imports, greater use of domestic coal, including production of synthetic fuels from coal, and nuclear sources. All known exotic sources—solar, ocean thermal, geothermal, fusion—are not expected to make a significant net contribution within this time frame.

What can we say about these supply options? Increased imports at OPEC prices will bankrupt the U.S. economy, and render us vulnerable to political blackmail.

Massive increases in coal production will have massive adverse effects on the environment at every stage of the fuel cycle, from mining to combustion, and will require new capital facilities currently difficult or impossible to obtain.

Synthetic fuels from coal, or large scale oil shale production, again will be environmentally destructive, place huge demands on capital, and pre-empt scarce water supplies.

Nuclear plant design and construction is plagued by huge cost over-runs, lengthening delays from a variety of causes, an increasingly skeptical climate of public opinion about plant safety and waste disposal, and many other problems.

If we look at the other side of the coin, and choose the policy approach of reducing demand, to ease the pressure on the very unattractive supply options, we face other problems.

Voluntary conservation doesn't work, or doesn't work very well. Compulsory conservation requires rationing, or mandating of energy efficiency in transportation, homes and businesses, together with other forms of regulation, all politically unattractive in the absence of an immediate and obvious crisis.

Conservation by the use of market forces requires greatly increased consumer prices wither by deregulating oil and natural gas prices, or by a very large consumer tax on all forms of energy. This is at least as unpalatable a policy choice as rationing.

Long-range conservation of energy will require investment in new conserving technologies (again requiring capital in a capital-scarce market) as well as new designs for buildings, transportation systems, energy conversion processes, and the layout of cities.

Even in the best of all possible worlds, with an ideal mix of short- and long-range energy supply and demand strategies, chosen by a perfectly informed and absolutely unselfish Congress, there will be traumatic short-term adjustments required by large segments of the population. There will be suffering for some, both economic and physical, and obscene profits and greater economic power for others.

In an imperfect world, those problems will be accentuated.

These are some of the factors in the policymakers dilemma.

ISSUES OF THE NUCLEAR DEBATE

Let me speak briefly now to some of the specifics of the nuclear debate. I don't have too much doubt that the remaining technical problems of a nuclear powered economy can

be solved in some fashion. Insuring plant operating safety may involve more rigid operating procedures and training that we've been used to in non-military operations, but it seems reasonably possible. Reaching an adequate level of security in the over-all fuel cycle seems a similar challenge. Waste disposal would require great care in site selection and raises philosophical problems of our relation to future generations. However, I imagine that, in analogy to some of our past actions in the industrial age, we could manage to find both a site at least worth gambling on, and rationale for our legacy to the future. Ejection of nuclear wastes into the sun is always available as a last, and very expensive resort.

I must hurry to add, however, that though solutions to these problems all seem possible, they certainly don't combine to give a desirable portrait of an energy system. It's hard to know the technical details of reactor emergency cooling systems, or the plasticity of salt bed deposits. It's not hard to know, however, that all the elaborate technologies involved would remove energy production a giant step further from local control, or even the understanding of the average citizen.

This, in my mind, is a critical flaw in even an imagined "safe and secure" nuclear energy economy. A nuclear energy system meshes, most naturally, with a tightly organized, centralized industrial and political system, with all the potential for coercive and authoritarian tendencies which these systems have historically demonstrated. Adding all the necessary nuclear safeguard and security "solutions" together does not present a picture of the kind of peaceful, stable, and democratic world that I and, I think, most others would like to see. I hope very much that the public debate on nuclear power will begin to address this much more general problem. The selection of an energy system involves questions more important than some of the detailed safety matters on which so much effort has been expended so far. I'm very gratified that the nuclear power issue has given the public the chance to reflect on, and vote on, an issue which involves the kind of long-term organization of society which they want.

PROSPECTS FOR ALTERNATIVES TO NUCLEAR POWER

The ordinary alternatives to nuclear power do not provide me with much comfort. Certainly many of the derogatory things I've said about a nuclear economy apply to a coal economy. Just as one example, when I imagine the legacy to future generations of a massive coal combustion system, with health effects resulting from unknown emission products, and climate effects of ever increasing CO_2 emissions, it seems just as forbidding as the nuclear legacy. The organization of a complex coal powered energy system will have many of the same problems of centralization which I've cited for the nuclear cases. I could also imagine that if we let our technocratic tendencies work their will on something as appealing as solar energy we would be able to convert it as well, to a highly bureaucratized system, overly complicated and centralized, and far from being in equilibrium with natural systems.

As for which energy system is best to bet on in economic terms, I find myself even more confused than on questions of relative technological merit or safety. Certainly nuclear economics are disappointing to those who hoped for an endless source of inexpensive power, but no matter how expensive nuclear systems become we need only wait awhile to find fossil fuel energy even more dear. It appears to me also that we've been learning lately that costs of energy systems depend most strongly, not on hardware and simple development and operating costs, but on a complex of other factors. These may include the private and public division of indirect costs, on regulatory and tax decisions, and on the role of public grants, loans, and guarantees in raising capital. In estimating the economics of technologies not yet commercially exploited we then have all the technical and cost uncertainties, plus a great many related to public policy. What this comes down to is a feeling that we cannot gamble on the collective Congressional judgment on the relative merits of photovoltaic vs. thermal or biological solar conversion, or on any of the other myriad technological-economic trade-offs in energy decisions. Moreover, though the judgment of an ERDA analyst or the total wisdom of the executive branch may be somewhat more sophisticated, the chance of their correctly predicting the optimum energy technology fifty years from NOW is probably also rather small. Historically, we have simply not been very effective in guessing economic and technological trends in a climate of rapidly changing conditions.

THE NONREADINESS OF ALTERNATIVE ENERGY SOURCES

Amidst all the unanswered questions, there is one thing we can unfortunately say with some certainty. We are not ready for a massive conversion to a non-nuclear, non-fossil, alternative energy system. Some of these new energy technologies may be promising or even proven totally feasible. Unhappily, however, in our concentration on the use of inexpensive gas and oil, we have lost any semblance of diversity and adaptability in energy production as I indicated at the beginning of my remarks. The systems for manufacturing, marketing, installation, maintenance and consumer education for any of the newer and more promising energy technologies simply do not exist, and will take years to evolve. The channeling of capital for application to any of the new systems will depend on the marginal benefits in operating costs, but these will only become apparent in a gradual sense as operating experience is slowly acquired.

THE CONSERVATION AND ENERGY EFFICIENCY STRATEGY

Where does all this lead? I've said that I wouldn't be surprised if all the technical and safety problems of nuclear power could be solved, but that I don't like the looks of the likely solutions. On the other hand, I obviously don't take much comfort in a coal energy economy and I see no other supply alternative ready to fill the gap. I've indicated before that I see our best immediate step as that of moving in every way possible to an energy conserving and energy efficient life style. As a key first step we must begin to allocate more of our scarce investment resources in this direction. I said that I had a hard time seeing the future of some energy supply technologies relative to others—but I have little trouble in drawing the conclusion that an energy conservation strategy is far superior to all of these. It's the one where the returns, in BTU's not needed, will be fastest, far faster than trying to generate new BTU's from undeveloped technologies. It's also the one where the unfavorable impacts on the social and environmental structure will be least. Just as important, it's the one in which the returns on energy investment, in the form of conservation energy savings by individual homeowners, tenants and businessmen, will flow most equitably through society. Most important of all, it's the one which will permit the most flexibility and time to design new energy systems with the greatest diversity—and may enable us to think of the decentralized approaches which I feel are so vital.

THE NEED TO REESTABLISH A SET OF OPTIONS

Even with my conservation strategy, I can't fool myself that we will not need some new forms of energy supply, at least in a thirty to fifty year period required for evolution to a non-petroleum based steady-state energy economy. So I have to face the energy supply problem, and I have to face the "future of nuclear power" which lurks in the title of this symposium.

What I cannot see our nation doing is abandoning completely the nuclear power option at this time. I think, as I said at the outset, that we have made a serious historical mistake in narrowing our energy options to the point we find them now. It is very difficult to justify narrowing them further. I would like, in say thirty years, to see us emerge from the current position of having to choose among two or three distasteful energy possibilities. Instead, I want to have a set of choices, which can suit the varied needs of particular segments of the world community, under a range of future conditions which we can't now accurately predict. In our defense strategy the public has long accepted the notion that a considerable financial investment is justified simply to preserve a set of options for the future, and a flexibility in responding to varied problems. This is done even in the knowledge that many of the options will never be used. I think our energy strategy is as important as our military strategy, and I would like to see us understand the need for options in energy policy as well. Looking for a single will-o-the-wisp optimum energy technology is a vain effort, I fear. It may also be dangerous, because of our inability to judge future needs.

Thus, from our current nuclear power deployment, I would like to see us go as slowly as possible, pushing for energy conservation and more benign technologies to take up the slack. I don't want nuclear development at a rate which will comfortably satisfy demand, but instead at a foot-dragging pace which will force consideration of other options and enforce conservation. Over-reliance on nuclear development can restrict growth of alternatives and I think it is critical that we avoid that situation.

Further, I hope that our planning and development for a long-range breeder economy will all go to waste—in roughly the same sense that I hope all our aircraft carriers and hardened missile silos and every other piece of military hardware will become obsolete without ever seeing a moment of action. I hope we'll be surprised by the rapid emergence of the more benign energy technologies, those within human and local community reach, and those which are harmless not because they're guarded by armies and embedded in concrete, *but because they are inherently safe and secure*. Nonetheless, I can't justify to myself a total break with the nuclear option because I don't have the foresight to know that the better alternatives will be there when needed. Hopefully, the use and development of nuclear power will be a fleeting and half-hearted exercise of the next twenty years or so, until the more attractive options are available.

Feeling, however, that we got into this fix by blindly narrowing options too greatly in the last century, I can't advocate actions which may repeat the mistake.

So, as with all good dilemmas, I find no comfortable solutions. I do console myself that the dialectic processes of human cultural development require that from each confrontation of thesis and antithesis there must arise a new and hopefully better, synthesis. This is the challenge of the nuclear policy debate.

LEAVE OF ABSENCE

By unanimous consent, leave of absence was granted to:

file in S.1

THE WASHINGTON POST Thursday, Feb. 12, 1976 ★★A3

Compromise Sought on S.1

By John P. MacKenzie
Washington Post Staff Writer

The Senate leadership called yesterday for a compromise on legislation to revamp U.S. criminal law, scrapping 13 controversial proposed provisions that have caused a deadlock within the Senate Judiciary Committee.

Majority Leader Mike Mansfield (D-Mont.) and Minority Leader Hugh Scott (R-Pa.), in a joint letter to Judiciary Committee members, said the time had come to end the long battle over S. 1, the 799-page law reform bill, by approving its noncontroversial features.

Under the Mansfield-Scott proposal, a new bill would be introduced without sections on official government secrets, insanity, the death penalty, obscenity, the right of self-defense and other controversial subjects that have brought criticism from the news media and civil liberties organizations.

Those subjects would continue to be governed by current law without change, the Senate leaders said, allowing Congress to clear "the remaining 90 per cent" of the massive bill that is considered essential for law reform.

The noncontroversial features include the listing in one place in the code of federal laws all the major crimes and legal defenses, replacing the current "hodgepodge" of criminal laws with overlapping, conflicting and partly obsolete provisions.

Scott and Mansfield said the legislation should receive "a new number" because "the number S. 1 now serves as a battle cry for both the right and the left to oppose its most objectionable features," causing "controversy and pain" to senators.

Their proposal would prohibit major amendments in the Judiciary Committee where the bill has been tied up for several months, but would not preclude attempts to amend it on the Senate floor.

Sen. Roman L. Hruska (R-Neb.) responded immediately that the proposal was acceptable to him. There was no immediate response from other committee members.